No. 22127

IN THE

United States Court of Appeals

For the Ninth Circuit

ELEANORE R. JESS,

Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellee.

Brief of Appellee

On Appeal from the United States District Court for the District of Montana

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STATEMENT OF JURISDICTION

This is an appeal from a judgment dismissing a complaint pursuant to appellee's Motion to Dismiss. The case was originally filed in the State Court in Montana and was removed to the United States District Court for the District of Montana. The United States District Court had jurisdiction under 28 U.S.C. §1332(a)(1).

This Court has jurisdiction of the appeal as provided for in 28 U.S.C. §1291.

STATEMENT OF THE CASE

In addition to the matter contained under the heading "Statement of the Case", on pages 1 and 2 of Appellant's brief, the complaint which was filed by Appellant in this case sought to recover damages in the amount of $125,000.00 for loss of future earnings of her husband. Throughout the proceedings on Appellee's Motion to Dismiss in the District Court, Appellant treated this case as an action for loss of consortium, but the prayer of the complaint includes not only a count of $50,000.00, for damages for loss of consortium but also a count in the aforementioned amount of $125,000.00, for Appellant's husband's loss of future earnings.

ARGUMENT

Summary of Argument

I. THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C. §§51 et seq.) PROVIDES THE EXCLUSIVE REMEDY AVAILABLE FOR RECOVERY OF DAMAGES FOR INJURIES SUSTAINED BY RAILROAD EMPLOYEES IN THE COURSE OF THEIR EMPLOYMENT.

II. UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C. §§51 et seq.), THE SPOUSE OF AN INJURED RAILROAD EMPLOYEE MAY NOT MAINTAIN AN ACTION FOR LOSS OF CONSORTIUM OR FOR LOSS OF THE INJURED EMPLOYEE'S FUTURE WAGES.

I.

The complaint filed by appellant in this case alleges that appellant's husband was an employee of appellee, Great Northern Railway Company; and on January 12, 1965, while engaged in his employment, he sustained injury as a result of negligence on the part of appellee Railway Company. The complaint then asks for damages in the amount of $125,000.00, for loss of future wages of appellant's husband; and the amount of $50,000.00, for appellant's loss of consortium.

Section 1 of the *Federal Employers' Liability Act*, (45 U.S.C. §51) reads as follows:

> "§51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Co-

lumbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any such person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier, in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

The complaint filed in this case does not specifically allege that the action is under the Federal Employers' Liability Act, or F.E.L.A. as it is commonly referred to, but, nevertheless, the allegations contained

in the complaint do show that the injury complained of is one which is covered by the F.E.L.A.

The Federal Employers' Liability Act is the exclusive remedy available for injuries such as the injuries complained of in the complaint filed in this case. The F.E.L.A. does not give the wife of an injured employee (unless the injury results in death which is not the situation in this case) any standing to bring the action. And, in death cases, the action can be brought only by the personal representative of the deceased and not the surviving spouse, as such. Loss of consortium is not an element of damages recoverable under the Federal Employers' Liability Act. The complaint in this case does not state a claim against defendant upon which relief can be granted and the District Court was correct in granting appellee's Motion to Dismiss the complaint.

The United States Supreme Court ruled that the Federal Employers' Liability Act is the exclusive remedy in cases involving injuries to railway employees in the so-called "Second Employers' Liability Cases" (*Mondou v. New York, New Haven and Hartford Railroad Co.*, 233 U.S. 1, 55, 56 L.Ed. 327, 348, 38 L.R.A. (N.S.) 44, 32 S.Ct. 169, 1 NCCA 875). These four cases were consolidated for hearing and decision by the Supreme Court and the principal point involved was whether or not the F.E.L.A. was consti-

tutional. The Court held that it was. The Court also said, at 56 L.Ed. 348:

> "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. Sherlock v. Alling, 93 U.S. 99, 23 L.Ed. 819; Smith v. Alabama, 124 U.S. 465, 473, 480, 482, 31 L.Ed. 508, 510, 513, 514, 1 Inters.Com.Rep. 804, 8 Sup.Ct.Rep. 564; Nashville, C. & St. L.R. Co. v. Alabama, 128 U.S. 96, 99, 32 L.Ed. 352, 2 Inters.Com.Rep. 238, 9 Sup. Ct.Rep. 28; Reid v. Colorado, 187 U.S. 137, 146, 47 L.Ed. 108, 113, 23 Sup. Ct.Rep. 92, 12 Am. Crim.Rep. 506. The inaction of Congress, however, in no wise affected its power over the subject. The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 581, 22 L.Ed. 654, 664; Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 215, 29 L.Ed. 158, 166, 1 Inters.Com.Rep. 382, 5 Sup.Ct.Rep. 826. *And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.* Gulf, C. & S. F. R. Co. v. Hefley, 158 U.S. 98, 104, 39 L.Ed. 910, 912, 14 Sup.Ct.Rep. 802 Southern R. Co. v. Reid, No. 487, 222 U.S. 424, ante, 257, 32 Sup.Ct.Rep. 140; Northern P. R. Co. v. Wash-

ington, No. 136, 222 U.S. 370, ante, 237, 32 Sup. Ct.Rep. 160." (Emphasis supplied.)

In 1917 the Supreme Court of the United States decided some cases which had to do with the scope of the F.E.L.A. as it applied to situations which some people felt might also have been covered by State workmen's compensation acts. In *New York Central Railroad Co. v. Winfield*, 244 U. S. 147, 149, 150, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A. 1918C, 439, Ann. Cas. 1917D, 1139, the Court said:

"That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in Missouri, K. & T. R. Co. v. Wulf, 226 U.S. 570, 576, 57 L.Ed. 355, 363, 33 Sup.Ct.Rep. 135, Ann.Cas. 1914B, 134, and other cases, it is pointed out that the subject which the act covers is 'the responsibility of interstate carriers by railroad to their employees injured in such commerce;' in Michigan C. R. Co. v. Vreeland, 227 U.S. 59, 66, 67, 57 L.Ed. 417, 419, 420, 33 Sup.Ct.Rep. 192, Ann.Cas. 1914C, 176, it is said that 'we may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury;' that by it 'Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce,' and that it is 'paramount and exclusive;' in North Carolina R. Co. v. Zachery, 232 U.S. 248, 256, 58 L.Ed. 591, 594, 34 Sup.Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N.C.C.A. 109,

> it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the federal act governs to the exclusion of the state law; . . ."

See also: *St. Louis, San Francisco, and Texas Railway Company v. Seale et al.*, 229 U.S. 156, 158, 57 L.Ed. 1129, 1133, 33 S.Ct. 651; *North Carolina Railroad Co. v. James A. Zachery, Administrator*, 232 U.S. 248, 256, 345 S.Ct. 305, 58 L.Ed. 591, Ann.Cas. 1914C, 159; *Erie Railroad Company v. Winfield*, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057; *Camerlin v. New York Central Railroad Company*, 199 F.2d 698, 703, (CA1-1952).

The complaint in this case does not allege that the Federal Employers' Liability Act is applicable. However, since the F.E.L.A., when applicable, is the exclusive remedy against a railroad company for injuries suffered by railroad employees, disregard of the F.E.L.A. by the parties does not relieve the Court of the necessity of determining whether the F.E.L.A. applies. *Metropolitan Coal Co. v. Johnson, New York, New Haven and Hartford Railroad Co. v. Johnson*, 265 F.2d 173, 177 (CA1-1959). The allegations in the complaint filed in this case are sufficient to show that the accident occurred while plaintiff's husband was employed by an interstate railway company. The F.E.L.A. is the exclusive remedy for damages suf-

fered by reason of the injury alleged in the complaint.

In *Florida East Coast Railway Company v. Pollack*, 154 S.2d 346 (Fla-1963) the District Court of Appeal, Third District of Florida, said:

> "The Federal Employers' Liability Act exclusively covers the entire field under which an employer in interstate commerce shall be liable for injury to its employee likewise engaged. The *substantive rights and obligations* of one bringing an action under the act *depend upon the act and applicable principles of common law as interpreted and applied by the federal courts.* Chesapeake & Ohio R. Co. v. Stapleton, 279 U.S. 587, 49 S.Ct. 442, 73 I.Ed. 861; Chicago, N. & St.P.R. Co. v. Coogan, 271 U.S. 472, 46 S.Ct. 564, 70 L. Ed. 1041; New Orleans & N.E.R. Co. v. Harris, 247 U.S. 367, 38 S.Ct. 535, 62 L.Ed. 1167. No state statute, law or other enactment can enlarge or contract the operation of the act and the rights and obligations arising thereunder. Chesapeake & Ohio R. Co. v. Stapleton, supra. See also Davee v. Southern Pacific R. Co., 58 Cal.2d 572, 25 Cal. Rptr. 445 (1962), 375 P.2d 293."

In a recent case decided by the U. S. Court of Appeals for the Sixth Circuit, *Bridger v. Union Railway Company*, 355 F.2d 382 (1966), the Court said, at 355 F.2d 382, 393:

> "Courts of the land have long, often, and firmly held that since Congress, by the adoption of the Federal Employers' Liability Act, has preempted the 'field of employers' liability to em-

> ployees in interstate transportation by rail * * * all state laws upon that subject were superseded * * * the rights and obligations of the [railroad employer] depend upon that Act and applicable principles of common law as interpreted by the federal courts.' Chesapeake & Ohio R.R. v. Stapleton, 279 U.S. 587, 588, 49 S.Ct. 442, 73 L.Ed. 861 (1929)."

Appellant, as page 7 of her brief, argues that the complaint filed in this case is for a personal and separate claim that appellant has for damages alleged to have been caused by the negligence of appellee railroad when appellant's husband was engaged in the scope of his employment as an employee of appellee. Appellant's contention cannot stand in light of the clearly established rule that the Federal Employers' Liability Act is the exclusive remedy for injuries such as the injuries complained of in this case.

The principal difference between the positions taken by appellant and appellee in this case is that appellant contends that the Federal Employers' Liability Act has nothing to do with this case and appellee, on the other hand, submits that the case does fall within the purview of the Federal Employers' Liability Act and is to be decided by referring to the Act and the cases which have interpreted it.

On page 14 of appellant's brief appellant cites the last paragraph of 16 Am.Jur.2d, *Constitutional Law*,

§207, page 445. The immediately preceding two paragraphs of Section 207, beginning at 16 Am.Jur.2d, p. 444, read as follows:

"It is relatively obvious that where Congress has legislated upon a subject which is within its constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the states is necessarily excluded, and any state legislation on the subject is void. The relative importance to the state of its own law is not material when there is a conflict with a valid federal law; any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield. Moreover, the state has no right to interfere or, by way of complement to the legislation of Congress, to prescribe additional regulations and what they deem auxiliary provisions for the same purpose. Congress' authority to act within the scope of its powers so as to displace state power is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.

Perhaps less obvious, but no less well established, is the rule that when Congress passes a law in that field of legislation common to both federal and state governments, the act of Congress supersedes all inconsistent state legislation. Congress in regulating a matter within the concurrent field of legislation speaks for all the

people and all the states, and it is immaterial that the public policy embodied in the congressional legislation overrules the policies theretofore adopted by any of the states with respect to the subject matter of such legislation."

Appellant cites a portion of 16 Am.Jur. 2d, *Constitutional Law*, Section 208, on Page 14 of her brief. The citation erroneously refers to being on Page 466. This is apparently a typographical error, as the quotation does appear at 16 Am. Jur. 2d, *Constitutional Law*, §208, p. 446. The entire first paragraph of Section 208 reads as follows; as set forth in 16 Am.Jur. 2d, p. 445-446:

> *"Determination of existence of conflict with state action.*
>
> Basic to the ascertainment of the effect of the enactment of federal legislation upon state legislation within the same legislative area is the question whether there is actually a conflict between the federal and state legislation. When the question is whether the federal act overrides a state law, the entire scheme of the statute must be considered, and a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy or Congress has at least manifested a purpose to exercise its paramount authority over the subject. Absent an obvious repugnancy between the federal and state legislation, a state will be held barred, as a conse-

quence of federal legislation, from legislating within a particular area only where the intention of Congress to exclude state action is clearly manifested. The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude a state must be answered by a judgment upon the particular case; it will not be held that a federal statute was intended to supersede the exercise of the power of the state, unless there is this clear manifestation of intention, since the exercise of federal supremacy is not lightly to be presumed. The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

The rule that the Federal Employers' Liability Act is the exclusive remedy available for the recovery of damages for injuries sustained by railway employees was firmly established by two decisions of the Supreme Court of the United States which were handed down on the same day, May 21, 1917. The cases are: *New York Central Railroad Company v. James Winfield*, 244 U.S. 147, 61 L.Ed. 1045; and *Erie Railroad Company v. Amy L. Winfield*, 244 U.S. 170, 61 L.Ed. 1057. In the *James Winfield* case, plaintiff sustained an injury in which he lost the sight of one eye and he filed a claim under the Workmen's Compensation

Law of New York and an award was made to him. The railroad company appealed the award, taking the position that the obligation of the railroad company was governed exclusively by the Federal Employers' Liability Act. The Supreme Court of the United States reversed the New York Workmen's Compensation Commission, holding that the Federal Employers' Liability Act is comprehensive and exclusive in cases involving injuries to railway employees. The Court said:

> "It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both class-

es of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in Winfield v. Erie R. C. 88 N.J.L. 619, 96 Atl. 394, hold that the act relates only to injuries resulting from negligence, while the California court in Smith v. Industrial Acci. Commission, 26 Cal. App. 560, 147 Pac. 600, and the Illinois court in Staley v. Illinois C. R. Co. 268 Ill. 356, L.R.A. 1916A, 450, 109 N.E. 342, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 378, 379, 37 L.Ed. 772, 777, 778, 13 Sup.Ct.Rep. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U.S. 1, 51, 56 L.Ed. 327, 346, 38 L.R.A. (N.S.) 44, 32 Sup. Ct.Rep. 169, 1 N.C.C.A. 875. * * *"

In the *Amy Winfield* case the widow of a railroad employee who had been killed while walking across the

tracks at the end of a day's work, sought compensation under the New Jersey Workmen's Compensation Law. The highest appellate court in New Jersey held that the Federal Employers' Liability Act did not apply to the case because the Act did not and does not impose liability on the rail carrier in the absence of causal negligence. The Supreme Court of the United States reversed the New Jersey Court, holding that the Federal Employers' Liability Act did apply. The Court said:

> "The first question is fully considered in New York C. R. Co. v. Winfield, the opinion in which has been just been announced, 244 U.S. 147, ante, 1045, 27 Sup.Ct.Rep. 546, and it suffices here to say that, for the reasons there given, we are of opinion that the Federal Act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule of regulation which is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive."

The injuries alleged in the complaint filed by appellant in this case were sustained by appellant's husband who was engaged in the course and scope of his

employment as an employee of appellee railroad. The exclusive remedy for the recovery of damages for such injuries is provided for in the Federal Employers' Liability Act (45 U.S.C. §§51 et seq.). The Federal Employers' Liability Act does not provide for the recovery of damages for loss of consortium by a spouse of an injured railway worker. Nor does the Act make provision for the spouse of an injured railway worker to maintain an action for the injured railway employee's loss of future wages.

The complaint filed by appellant in this case clearly does not state a claim against appellee upon which relief can be granted. The Order granting appellee's Motion to Dismiss the complaint should be sustained.

II.

The complaint in this case asks for damages for loss of consortium suffered by appellant by reason of the fact that her husband was injured while engaged in his employment, due to the alleged negligence of appellee railroad. The Federal Employers' Liability Act is the exclusive, paramount and only law which provides for recovery of damages in cases of injuries involving railway employees and it does not include, as an element of damages, loss of consortium.

Companion cases were argued in the United States Supreme Court in 1917 which are persuasive for appellee railroad in this case. The cases, *New York*

Central and Hudson River Railroad Co. v. Michael Tonsellito, an infant; and *New York Central and Hudson River Rialroad Co. v. James Tonsellito*, 244 U.S. 360, 61 L.Ed. 1194, involved a situation where a 17 year old youngster named Michael Tonsellito suffered injuries while engaged in the course of his employment by the defendant railroad company. Michael Tonsellito brought an action through his father, James Tonsellito, as next friend, under the Federal Employers' Liability Act. The father brought the companion suit and claimed damages for expenses incurred for medical attention to Michael Tonsellito and he also claimed damages for the loss of Michael Tonsellito's services. Judgments for the plaintiffs were affirmed by the highest appellate court of New Jersey. The judgment for the injured worker was affirmed by the United States Supreme Court; but the judgment for the father for the expenses for the son's medical treatment and for the loss of his son's services was reversed. The Court said:

> "The court of errors and appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions, in New York C.R. Co. v. Winfield, 244 U.S. 147, ante, 1045, 37 Sup.Ct.Rep. 546, and Erie R. Co. v. Winfield, 244 U.S. 170, ante, 1957, 37 Sup.Ct.

Rep. 556 (decided May 21, 1917). There we held the act 'is comprehensive and also exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. 'It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state."

In *Louisville and Nashville Railroad Co. et al. v. Lunsford*, 216 Ga. 289, 116 S.E.2d 232 (Ga.-1960), the Supreme Court of Georgia said:

"This case came to the Supreme Court in certiorari to the Court of Appeals. The trial judge had dismissed the plaintiff's petition on a general demurrer, which questioned its sufficiency to state a cause of action for damages flowing from an alleged loss of the right of consortium. The Court of Appeals reversed that ruling. See Lunsford v. Louisville & Nashville Railroad Co., 101 Ga.App. 374, 114 S.E.2d 310. Hence the only question which is presented to this court for decision is whether a wife may sue for loss of consortium occasioned by an injury which her husband, an interstate employee of a railroad company, sustained in consequence of his employer's negligence as against the defendant's contention that Congress, in passing the Federal

Employers' Liability Act, 45 U.S.C.A. §51 et seq. preempted that field of legislation and excluded all remedies which might be resorted to for injuries to employees other than those provided for by such act. In determining the question so presented, it has been settled law in this State for a long time that this court and the court of appeals are both bound by and must follow the decisions of the Supreme Court of the United States construing applicable Federal statutes. See Clews v. Munford, 78 Ga. 476, 3 S.E. 267; Lee v. Central of Genrgia Ry. Co., 147 Ga. 428, 430, 93 S.E. 558, 13 A.L.R. 156; Looper v. Ga. S. & F. Railway Co., 213 Ga. 279, 99 S.E.2d 101; Southern Ry. Co. v. Turner, 88 Ga.App. 49, 51, 76 S.E. 2d 96; Atlantic Coast Line R. Co. v. Shed, 90 Ga.App. 766, 769, 84 S.E.2d 212. And since the only question presented by the record in this case is settled and controlled adversely to the plaintiff's asserted claim for damages, and her right to maintain an action therefor by the ruling of the Supreme Court of the United States in New York Central & Hudson River Railroad Co. v. Tonsellito, 244 U.S. 360, 361, 37 S.Ct. 620, 61 L.Ed. 1194; New York Central R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546; 61 L.Ed. 1045; and Erie Railroad Co. v. Winfield, 244 U. S. 170, 37 S.Ct. 556, 61 L.Ed. 1057, it necessarily follows that the judgment rendered by the Court of Appeals is erroneous, and since those three cases so clearly announce the rule which must be applied in this case, it is not deemed necessary to here restate or elaborate the rulings there made.

Judgment reversed. All the Justices concur."

In *Kinney v. Southern Pacific Co.*, 375 P.2d 418, Ore.-1962) the Oregon Supreme Court held that a ife, whose husband had recovered under the F.E.L.A. or injuries sustained while employed by the rail carier could not maintain an action for loss of consortum. The Court said:

"In New York Central R.R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045, it is clearly pointed out that the congress in enacting the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq., had preempted this field as to carriers engaged in interstate commerce; that this congressional action thus determined that injuries received by such carrier employees are to be compensated under the Act and liability of employers to their employees is to be determined exclusively under the Act, and therefore the states have no power to afford other relief which may create a liability upon the employer.

In New York Cent. & H. H. Co. v. Tonsellito, 244 U.S. 360, 37 S.Ct. 620, 61 L.Ed. 1194, the court reaffirmed these principles set forth in New York Central R. R. v. Winfield, supra, in an action brought by a father to recover for the loss of his minor son's services due to an injury received by the son who had recovered compensation under the Federal Employers' Liability Act, stating, 'Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, *such liability can neither be extended nor abridged by*

common or statutory laws of the state'. (emphasis added)

We are unable to discover any logical reasoning that would permit recovery in an action for loss of constortium by a wife, and not allow a recovery in an action by a parent for loss of a child's services, under this sweeping language of the Supreme Court of the United States. We are bound by these decisions.

The Supreme Court of the State of Georgia in the recent case of Louisville & Nashville Railroad Co. v. Lunsford, 216 Ga. 289, 116 S.E.2d 232, a case in which a wife sought to maintain an action for loss of consortium when the husband had been injured while employed by a carrier and had recovered compensation under the Federal Employers' Liability Act, held as we do, that such an action cannot be maintained."

In the case of *Igneri v. Cie, De Transports Oceanques*, 323 F.2d 257 (1963), the Court of Appeals for the Second Circuit held that, under the Jones Act which applies similar rules of law to seaman as the Federal Employers' Liability Act applies to railway employees, a wife has no claim for damages for loss of consortium resulting from injury allegedly caused by negligence of the employer.

The cases cited above clearly establish that a wife of an injured railway employee does not have standing to sue for loss of consortium. Appellant does not cite any case in her brief in which a Court ruled that

he wife of an injured railway employee could maintain an action for loss of consortium.

On Page 15 of her brief, appellant argues that she should be allowed to bring an action for loss of consortium under the common law of Montana because no provision in the Federal Employers' Liability Act allows a wife to recover for loss of consortium. Appellee submits that this is precisely why appellant cannot bring such an action. The Federal Employers' Liability Act is exclusive in the field of injuries to railway employees. The Act does not provide for any claims by wives or husbands for loss of consortium and the cases which we have cited above clearly establish that a claim for loss of consortium is not recognized under the Federal Employers' Liability Act in those cases, such as this case, which fall within its purview.

The complaint filed by appellant in the lower court, in addition to claiming loss of consortium, makes a claim for loss of future earnings of appellant's husband. Appellee concedes that the Federal Employers' Liability Act does contemplate, as one of the elements of damage which may be recovered by a successful plaintiff in an F.E.L.A. case, loss of future earnings. However, the right to recover loss of future earnings is vested in the injured employee, or, in the case of the employee's death, the right is vested in his per-

sonal representative. Appellant filed this action as the wife of an injured railway employee. Under the Federal Employers' Liability Act she has no standing to claim loss of his future earnings.

In *Sarik et al. v. Pennsylvania Railroad Co.*, 68 F. Supp. 630 (1946) it was held that a husband of an injured railway employee had no right to recover for injuries to his wife. The Court said:

> "When the case was submitted to the jury the court was of opinion that the right of Michael Sarik to recover a verdict depended upon a right at common law. The court so thinking, the jury was erroneously allowed to pass upon his claim. It has been definitely held that the Federal Employers' Liability Act takes away any common law right to recover. It is 'comprehensive and also exclusive', and cannot 'be extended or abridged by common or statutory laws of the state.' See New York Central & Hudson River Railroad Co. v. Tonsellito, 244 U.S. 360, 37 S.Ct. 620, 621, L.Ed. 1104; New York Central Railroad Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045; Erie Railroad Co. v. Winfield, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057, Ann.Cas. 1918B, 662.
>
> In New York Central & Hudson River Railroad Co. v. Tonsellito, the father of an injured minor employee recovered a verdict in the lower courts for medical expenses paid by him. The Supreme Court reversed this judgment.

Michael Sarik having no right to recover as husband of the injured employee, the motion for a new trial on his behalf is baseless."

The alleged injuries for which damages are sought this case occurred in a factual setting which brings s case within the scope of the Federal Employers' ıbility Act. The Federal Employers' Liability Act es not allow a spouse of an injured railway worker sue for loss of consortium, nor does the Act allow spouse to file an action for the injured railway ployee's loss of future earnings. The District urt's Order granting appellee's Motion to Dismiss complaint in this case should be sustained.

CONCLUSION

Appellee, Great Northern Railway Company, re-ctfully submits that the judgment of the District urt should be affirmed.

DATED this 17th day of November, 1967.

WEIR, GOUGH & BOOTH

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By s/ Cordell Johnson

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

s/ Cordell Johnson
Attorney

CERTIFICATE OF SERVICE

I, CORDELL JOHNSON, one of the attorneys for Appellee, Great Northern Railway Company, hereby certify that three copies of the within and foregoing Brief of Appellee were, with postage fully prepaid thereon, mailed on the 17th day of November, 1967, and directed to the following counsel of record:

Tipp, Hoven and Brault
and Gordon E. Hoven
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s/ Cordell Johnson